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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

REVIEW OF FOIA ACTION

In the Matter of)

MCI WorldCom, Inc.)

Freedom of Information Act Request)

FOIA Control No. 99-163

CC Docket No. 99-117

**AMERITECH'S APPLICATION FOR REVIEW OF THE CCB'S ACTION
GRANTING MCI WORLDCOM'S FOIA REQUEST**

I. INTRODUCTION AND SUMMARY

Pursuant to Section 0.461(i) and 1.115¹ of the Commission's rules, Ameritech hereby petitions the Commission for review of the July 27, 1999 action ("the Action", see Exhibit 1 hereto) in this proceeding, by the Common Carrier Bureau, granting MCI WorldCom's request for certain materials contained in the Commission's files relating to the Accounting Safeguard Division ("ASD") audit of the Ameritech Telephone Operating Companies' Continuing Property Record (CPR).² The materials are allegedly sought to allow MCI WorldCom to address Issue No. 2 set forth in the Commission's NOI in CC Docket 99-117.³

¹ See 47 C.F.R. § §0.461(i) and 1.115. Ameritech believes §459(g) cited in the CCB Action is inapplicable.

² See Letter dated June 22, 1999 from Ms. Mary L. Brown of MCI WorldCom to Mr. Andrew Fishel of the Federal Communications Commission, "MCI Request".

³ See *In the Matters of Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit et al*, CC Docket No. 99-117, ASD File No. 99-22, Notice of Inquiry released April 7, 1999, Issue 2, ("CPR NOI").

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In its letter dated July 12, 1999 (see Exhibit 2 hereto), Ameritech pointed out that the requested information qualifies for treatment under FOIA Exemption 4⁴. Therefore release of such information would be contrary to Section 0.457(d)(iii) of the Commission's rules, which treat information gathered in connection with, "...audits, investigations and examination of records pursuant to 47 U.S.C. Section 220" as "not routinely available for public inspection."⁵ Further, Ameritech opposed the request of MCI WorldCom on the grounds that: 1) release of the audit information would undermine the integrity and independence of the Commission's audit process, and compromise the efficiency and effectiveness of future audits; 2) there is sufficient material in the public record to allow MCI WorldCom and other third parties to adequately address the issues raised in the CPR NOI; and 3) MCI failed to make any persuasive showing to support disclosure.

Despite Ameritech's opposition, the Bureau granted MCI's request, concluding that any potential harm from the release of competitively sensitive information contained in the Commission's files "can reasonably be ameliorated by allowing release through a protective order."⁶ As shown below, the Bureau's Action is based on an erroneous legal analysis of the Commission's statutory authority and the strained conclusion that "this release does not signal a change in the longstanding Commission position of protecting

⁴ 5 U.S.C. §552(b)(4).

⁵ See also GC Docket No. 96-55, Report and Order, released August 4, 1998 at §§52-57, ("Confidentiality Order"); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (1992); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

⁶ See the Action, at p. 2.

its audit materials.”⁷ The Bureau’s unlawful action should be vacated and MCI’s FOIA request denied.

II. THE BUREAU ERRED IN RELYING ON SECTIONS 154 (j) AND 220 (f) OF THE COMMUNICATIONS ACT TO AUTHORIZE THE DISCLOSURE OF PROPRIETARY MATERIALS AND AUDIT WORKPAPERS.

The Bureau’s Action concedes that certain RBOC materials “fall under the ambit of Exemption 4” of FOIA, and that Exemption 5 cover the requested audit workpapers. Rather than reach the merits of the FOIA exemption claims, however, the Action finds that the Commission has “explicit” discretionary authority to disclose the information under Sections 154(j) and 220 (f) of the Communications Act⁸ The very foundation for the Bureau’s determination is fundamentally unsound, and the Action is in error.

A. The Bureau’s reliance on the broad enabling language in the Communications Act is misplaced in respect to the release of FOIA-exempt materials.

Despite the Bureau’s assertion, there is simply nothing explicit in Sections 154 (j) or 220 (f) which gives the Commission authority to disclose audit materials covered by the Trade Secrets Act⁹ or FOIA Exemptions 4 and 5.

Section 154 (j) is merely a general direction to conduct proceedings before the Commission “to the ends of justice.”. It can not be read to negate the Commission’s Confidentiality Order,¹⁰ its Rules, particularly §0.461, or its longstanding practices.¹¹ In

⁷ Ibid. at p. 3.

⁸ Ibid., citing 47 U.S.C. 154 (j) and 220 (f).

⁹ 18 U.S.C. §1905.

¹⁰ See GC Docket No. 96-55, Report and Order, released August 4, 1998 at §§52-57, (“Confidentiality Order”).

fact, the Bureau's Action turns on its head the Section 154 (j) directive to conduct Commission proceedings consistent with "the ends of justice" by "authorizing" in violation of the Freedom Trade Secret Act, the disclosure of confidential information.

Moreover, the Bureau's citation to Section 220 (f) for the proposition that it *authorizes* the Commission to disclose information gathered while examining a carrier's books or accounts is clearly anomalous and contrary to statutory intent. The section is intended as a *general prohibition* on members, officers and employees of the Commission from divulging audit information, rather than the grant of authority to disclose information, as the Action concludes. Section 220 (f) does not "authorize" disclosure by the Commission of confidential information protected by the Trade Secrets Act or FOIA, and it clearly does not allow disclosure by the Bureau on its own behalf before being "directed by the Commission or a court."

B. The Bureau improperly ignores MCI's failure to meet its burden of making a persuasive showing for disclosure of the requested information.

The Action simply fails to discuss the actual merits of MCI WorldCom's FOIA request. MCI WorldCom has not established a legitimate need, nor has it met its burden of making a persuasive showing for disclosure of the requested information in order to respond to Issue No. 2 of the NOI.¹² While MCI WorldCom may not have information with which to comment on a *specific* CPR item's score, the previously disclosed audit reports contain sufficient information with which to assess the *scoring methodology* used

¹¹ See also *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (1992); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

by ASD¹³, which is the issue on which the Commission is seeking comment. Therefore, the Bureau errs in concluding that NOI Issue No. 2 can only be answered by allowing interested parties access to the requested materials.

In addition, the Bureau improperly fails to consider the merits of Ameritech's Opposition. Remarkably, the Bureau did not even see the need to reach the merits of Ameritech's Exemption 4 and 5 arguments (see Exhibit 2). At a minimum, it was required to consider the merits of Ameritech's opposition to MCI's WorldCom's FOIA request. If it had done so, it could have properly found no basis for disclosure, even under a protective order, for the reasons set forth above.

C. The Bureau overstates the existence and importance of the duty to afford the opportunity for informed comment on Issue No. 2 of the CPR NOI.

The actions of the interested parties in the CPR NOI proceeding do not suggest an urgent need for access to the information in issue in order to file comments. Only MCI WorldCom filed a FOIA request, and its request came seventy five days after issuance of the NOI, fifteen days after the initial comment deadline, and nearly one month after it had requested a thirty day extension to file comments.

Even if the requested information is arguably needed to Comment on NOI Issue No. 2, there is no "unique situation" here which "requires the Commission to release"¹⁴ the requested information. Indeed, without substantive discussion, the Bureau characterizes the interest of providing parties access to the information in issue as

¹² See Confidentiality Order §19.

¹³ See CPR NOI at 3.

¹⁴ See the Action at p. 3.

“*compelling*,”¹⁵ and later refers to the Commission’s *duty* to ensure that the parties are given a reasonable opportunity to make informed comment on Issue No. 2 of the NOI.”¹⁶

The Bureau’s rationale for finding this duty is particularly ironic, since Ameritech was repeatedly denied the opportunity to fully communicate with the ASD on scoring and rescore matters during the audit process, contrary to generally accepted auditing standards (GAAS).

There simply is nothing about the inclusion of Issue No.2 in the CPR NOI which now requires the Commission to grant MCI WorldCom, or other interested parties, the role of after-the-fact “quasi-staff auditor” of Ameritech’s CPR by allowing them access to the requested information. The Commission can, and should, simply reject this apparent bootstrapping and confine the interested parties to the information in the audit reports.

D. The release of the audit workpapers is neither compelled nor warranted.

The audit workpapers fall within FOIA Exemption 5 as intra-agency memoranda or workpapers.¹⁷ As the Bureau acknowledges, “workpapers prepared by Commission staff auditors are historically withheld from disclosure as a private and clearly deliberative part of the audit process.”¹⁸ As discussed above, Sections 154 (j) and 220 (f) neither support nor compel release in this instance. In addition, the release of audit workpapers is contrary to conventional auditing practices subject to guidance by

¹⁵ Ibid. at p. 2.

¹⁶ Ibid. at p. 4.

¹⁷ See 5 U.S.C. §552(b)(5).

¹⁸ See the Action at p. 4.

generally accepted auditing standards (GAAS). The Bureau provides no sound reasoning to support its radical departure from the Commission's past practice.

E. The Bureau's Action allows disclosure of information which goes beyond MCI Worldcom's FOIA request and fails to accommodate Ameritech's interests in protecting its confidential information.

In describing the materials subject to the protective order, the Action includes "audit papers relevant to the initial scoring or characterization of sampled items *and undetailed investment...*"¹⁹ By granting access to materials related to undetailed investment, the Action steps beyond the scope of both MCI's request and Issue No. 2 of the CPR NOI. Undetailed investment is separately addressed at Issue No. 5 of the NOI, and therefore is clearly outside the scope of the Bureau's rationale for releasing the materials related to Issue No. 2. At a minimum, the Commission should reverse this determination and remove undetailed investment from the definition of Confidential Information in the Protective Order.

In addition, despite Ameritech's request for an opportunity to complete a prior review of all documentation and workpapers to identify and mask any confidential information unrelated to Issue No. 2, the Bureau simply broadly defines the universe of confidential information and provides that inspection of the materials be under protective order as directed and supervised by ASD staff. If MCI WorldCom's request is granted, the Commission should allow Ameritech a minimum of 90 days to complete its review,²⁰

¹⁹ Ibid. at p. 5. See also section 1 (c)(i) of the Protective Order attached to the Action.

²⁰ This time is necessary because of the volume of information associated with this audit, and the fact that many documents provided to the staff auditors under the expectation of confidentiality may contain proprietary information unrelated to the auditor's information request or the instant FOIA request. In

and should require that ASD Staff notify Ameritech which information will be made available and which parties have reviewed same under protective order.

III. DESPITE THE BUREAU'S ASSERTIONS, ITS ACTION WILL HAVE A DETREMENTAL EFFECT, AS WELL AS A LIKELY PRECEDENTAL EFFECT, ON COMMISSION AUDITS AND FOIA REQUESTS.

The requested information clearly qualifies for treatment under FOIA Exemption 4 and release of such information is contrary to Section 0.457(d)(iii) of the Commission's rules, which treat information gathered in connection with, "...audits, investigations and examination of records pursuant to 47 U.S.C. Section 220" as "not routinely available for public inspection."²¹ Deviations from this policy have only occurred rarely, and then only when aggregate summary data has been released because of an overriding public interest consideration. Such aggregate data has already been made available through the voluntary release of the CPR Audit Report and Ameritech's response to audit's findings.²²

The detrimental effect of the Bureau's actions transcends this docket. Release of the requested information would, apart from any immediate concerns of competitive injury to the audited carriers, impair the Commission's ability to obtain information in any future audits.²³ By opening the possibility that information collected during the course of a Commission audit will eventually become public, even under protective order, voluntary cooperation of carriers will likely diminish and future audit-related information

addition, Ameritech should be allowed access to staff workpapers 90 days prior to providing same to MCI WorldCom under a protective order, to allow for masking of out-of-scope proprietary information.

²¹ See also GC Docket No. 96-55, Report and Order, released August 4, 1998 at §§52-57, ("Confidentiality Order"); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (1992); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

²² See *In the Matter of Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit*, ASD File No. 99-22, Order (rel. March 12, 1999).

²³ See Confidentiality Order §52; *Scott J. Rafferty*, 5 FCC Rcd 4138 (1998) at §5.

requests will become more contentious, time consuming, and costly to complete because carriers will take all necessary steps to avoid, mask or otherwise resist the disclosure of competitively sensitive information.

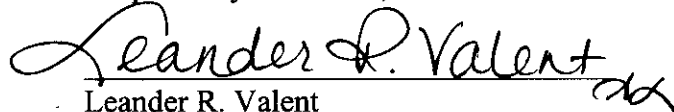
Contrary to the Bureau's claim, its action compromises the long-standing practice of protecting its audit materials. In addition, the Commission will establish the detrimental precedent with respect to the exercise of the Commission's broad discretionary authority in "unique situations"²⁴, by circumventing its own rules and *Confidentiality Order* to allow the release of FOIA-exempt material. Inexorably, if the instant Action is allowed to stand, every situation will be "unique" in the minds of persons making FOIA requests, and the concepts of "records *not* routinely available for public inspection" and "FOIA exemptions" will forever have diminished meaning if they can be ignored at the Commission's discretion.

²⁴ See the Action, at p. 3, first sentence.

IV. CONCLUSION

Upon review, MCI Worldcom's request for disclosure, whether outright or under a protective order, should be denied for the aforementioned reasons. If the Commission upholds the Bureau's determination to provide MCI WorldCom access to the requested information under a protective order, Ameritech again requests accommodation of its interests in protecting confidential information.

Respectfully submitted,

A handwritten signature in cursive script that reads "Leander R. Valent". The signature is written in dark ink and is positioned above the printed name.

Leander R. Valent

Counsel for Ameritech

9525 West Bryn Mawr, Suite 600

Rosemont, IL 60018

(847) 928-4396

Dated: August 3, 1999

Exhibit 1

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

July 27, 1999

Ms. Mary L. Brown
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Freedom of Information Act Request
Control No. 99-163; CC Docket No. 99-117

Dear Ms. Brown:

This is in response to your company's Freedom of Information Act (FOIA) request, dated June 22, 1999, and submitted to the Commission's FOIA Control Office on June 28, 1999. Your request, filed on behalf of MCI Telecommunications Corporation (MCI), seeks release of certain materials contained in the Commission's files relating to the Accounting Safeguards Division (ASD) audits of the Regional Bell Operating Companies' (RBOCs) Continuing Property Records (CPRs).¹ The materials sought relate to information concerning Issue No. 2 set forth in the Commission's NOI in CC Docket No. 99-117.²

The Common Carrier Bureau's ASD auditors performed audits of Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Bell, Southwestern Bell and US West Telephone Companies to determine if their records were being maintained in compliance with the Communications Act of 1934, as amended (hereinafter "Communications Act"), and the Commission's rules, and to verify that property recorded in the accounts represented equipment used and useful for the provision of telecommunications services. The Bureau provided each of the companies with its respective audit report for comment. In their comments, the companies disagree with the auditors' conclusions, as well as raise questions concerning the validity of the ASD auditors' findings as well as the audit process itself.

On April 7, 1999, ASD released a *Public Notice* containing a summary of the procedures used by the auditors to review requests of the companies to rescore specific

¹ On July 13, 1999, Advanstar Communications, Inc. filed comments in support of MCI's FOIA request.

² See *Notice of Inquiry*, In the Matters of Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit et al., CC Docket No. 99-117, ASD File No. 99-22 at 3, released April 7, 1999 (hereinafter "NOI."); MCI FOIA request at 2.

equipment items, as either found or not found.³ Concurrent with the *Public Notice*, the Commission issued a *Notice of Inquiry (NOI)*⁴ seeking public comment on certain issues arising out of audits of the companies' hard-wired central office equipment. NOI Issue No. 2 invited comment on:

The validity and reasonableness of the methodology used by the Bureau's auditors in determining whether to rescore or to modify a finding during a field audit that equipment was "not found."⁵

Ameritech Communications, Inc. (Ameritech), Bell Atlantic (Bell Atlantic), and Southwestern Bell Communications Inc., on behalf of Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (the SBC LECs), US West, Inc. (US West), and BellSouth Corporation (BellSouth) filed oppositions to the instant FOIA request. All contend that withholding the requested information is supported by previous Commission rulings, and disclosure in response to the instant request would be an unjustified departure from the Commission's established practice of withholding audit-derived materials, except in exceptional cases. All carriers assert confidentiality for the material at issue and seek protection from disclosure pursuant to Exemptions 4 and 5 of the FOIA, 5 U.S.C. §§ 552 (b) (4) and (b) (5).⁶ MCI, however, contends that the information requested is not commercially sensitive and public interest concerns justify disclosure.⁷

For the reasons set forth below, we grant, to the extent indicated herein, MCI's request for disclosure of certain materials. Any potential competitive harm to the RBOC companies from release of certain information contained in the Commission's files, and alleged by the RBOCS to be competitively sensitive, can reasonably be ameliorated by allowing release through a protective order. This approach also satisfies the compelling interest of providing parties access to the information in issue so that they have a reasonable opportunity to comment on NOI Issue No. 2.

Our decision to release audit materials in this case is not made lightly. We do so recognizing that the specific question raised in our NOI concerning the ASD auditors' rescoring process can only be answered by allowing parties interested in filing comments to

³ See *Public Notice*, The Accounting Safeguards Division Releases Information Concerning Audit Procedures for Considering Requests By the Regional Bell Operating Companies to Reclassify or "Rescore" Field Audit Findings of Their Continuing Property Records, DA 99-668, released April 7 1999.

⁴ *Id.*

⁵ NOI at 3.

⁶ Bell Atlantic Comments at 2; US West Comments at 4; Ameritech Comments at 2; BellSouth Comments at 2-3, SBC Comments at 2-3,5.

⁷ MCI FOIA request at 3.

review this material. Therefore, the unique situation of the specific question in the NOI requires us to release material which is not routinely made available to the public, even under protective orders. We do so at our discretion. Because the release of this information is discretionary, it does not serve as precedent for future requests under FOIA or otherwise. Furthermore, this release does not signal a change in the longstanding Commission position of protecting its audit materials, including materials subject to FOIA Exemption 5. Therefore, we grant MCI's request for inspection to the extent indicated herein and order release of certain material within the constraints of the attached protective order. A discussion of the rationale underlying this decision follows.

Certain of the materials filed by the RBOCs during the course of the audits that are in the Commission's files, and which are requested by MCI, may arguably be characterized as FOIA Exemption 4-type information. FOIA Exemption 4 allows the Commission to refrain from disclosing "trade secret and commercial or financial information obtained from a person and [that is] privileged or confidential."⁸ Moreover, the Trade Secrets Act prohibits the unauthorized release of trade and commercial information, including all materials protected by Exemption 4.⁹ The Trade Secrets Act does not, however, preclude disclosure of materials "otherwise protected" by the statute, if the disclosure is "authorized by law."¹⁰

In this case, the Commission has explicit statutory authority to exercise its discretion to disclose audit materials under Sections 154 (j) and 220 (f) of the Communications Act.¹¹ Section 154 (j) authorizes to the Commission to conduct its proceedings to "the proper dispatch of business and to the ends of justice."¹² Section 220 (f) authorizes Commission employees, upon the direction by the Commission, to disclose information gathered while examining a carrier's books or accounts.¹³ Due to the volume and nature of the audit materials in issue, without a line-by-line analysis, we cannot presumptively conclude that none of the requested materials fall under the ambit of Exemption 4. However, even assuming that some of the audit materials requested are covered by Exemption 4, we need not reach the merits of the Exemption 4 arguments in this case because the Commission has discretionary authority, "as authorized by law," to disclose the information under Sections

⁸ 5 U.S.C. § 552 (b) (4).

⁹ See *CNA Fin. Corp v. Donovan*, 830 F. 2d 1132, 1140 (D.C. Cir. 1987) (noting that Trade Secrets Act "appears to cover practically any commercial or financial data collected by any federal employee from any source.")

¹⁰ Trade Secrets Act, 18 U.S.C. § 1905

¹¹ 47 U.S.C. §§ 154 (j) and 220 (f); see also *In the Matter of Amendment of Part O of the Commission's Rules with Respect to Delegation of Authority to the Chief, Common Carrier Bureau*, 104 FCC 2d 733 (1986).

¹² 47 U.S.C. § 154 (j).

¹³ 47 U.S.C. § 220 (f).

154 (j) and 220 (f), and only does so insofar as such disclosure may be necessary for parties to prepare comments and respond to NOI Issue No. 2.

We believe this limited discretionary release of the audit-materials under protective order is appropriate because of the Commission's duty to ensure that parties are given a reasonable opportunity to make informed comment on Issue No. 2 of the NOI. Because we are unsure whether at least some data contained in the requested CPR audit materials could cause any RBOC competitive harm, we decline to order an unrestricted public release of these materials. We believe that limited disclosure, pursuant to the Commission's discretion within the constraints of the attached protective order, ameliorates any alleged threat of competitive injury to any RBOC, while allowing reasonable access to the audit materials solely for the purpose of allowing parties to the proceeding to make informed comment regarding Issue No. 2 of the NOI.

MCI's request also sought access to workpapers of ASD auditors prepared in connection with the audits at issue insofar as such workpapers may relate to Issue No. 2 in the NOI. FOIA Exemption 5 protects "interagency or intra-agency memoranda or letters which would not be available by law to a party . . . in litigation with the agency."¹⁴ Workpapers prepared by Commission staff auditors are historically withheld from disclosure as a private and clearly deliberative part of the audit process. We believe, however, a discretionary release of the workpapers, again pursuant to Sections 154 (j) and 220 (f) of the Communications Act, is warranted in this case. We believe our duty to allow a reasonable opportunity for informed public comment on Issue No. 2 of the NOI outweighs the possibility of any harm to our internal deliberative process from this limited disclosure.

MCI has asked to inspect the following information:

1. "Any materials submitted by the RBOCs to explain why hard-wired central offices equipment items were not found or to support claims that items in the sample should be "rescored.""
2. "Audit workpapers that show or support the item-by-item scoring of the sample, including but not limited to: (1) letters sent to each RBOC in late 1997, providing the results of the physical inspection; (2) any audit workpapers showing or supporting the item-by-item scoring underlying these letters; (3) any audit workpapers showing or supporting the item-by-item scoring underlying the July, 1998, draft audit reports; and (4) any audit workpapers showing or supporting the item-by-item scoring underlying the December, 1998, audit reports.

¹⁴ 5 U.S.C. § 552 (b) (5).

3. "The continuing property record detail (vintage, description, etc.) for any items scored "partially found," "not found," or "not verifiable" at any time during the audit process." ¹⁵

Pursuant to the attached protective order, inspection of the materials requested above is allowed only to the extent necessary to allow parties to CC Docket No. 99-117 to prepare comments with regard to Issue No. 2 of the NOI. Materials subject to this protective order shall include audit papers (Commission workpapers and company information submitted by companies) relevant to the initial scoring or characterization of sampled items and of undetailed investment and to any and all consideration of the scoring or characterization of those items prior to the release of the audit reports on February 26, 1999. A more specific listing of these materials is provided in the attached protective order that is incorporated in this letter by reference. Furthermore, the inspection of materials pursuant to this order will be directed and supervised by ASD staff. The specific materials covered and procedure for review are addressed in the protective order attached.

If you consider this disposition to be a denial of your FOIA request, pursuant to Section 0.461(i)(2) of the Commission's rules¹⁶, you may seek review of the Bureau's decision by filing an application for review. With respect to the denial of the RBOCs' requests for confidentiality, pursuant to Section 0.459(g) of the Commission's rules,¹⁷ any RBOC may seek review of the Bureau's decision to permit disclosure as provided herein.

Sincerely,



Lisa M. Zaina
Acting Deputy Chief, Common Carrier
Bureau

¹⁵ MCI FOIA request at 1-2.

¹⁶ 47 C.F.R. § 0.461 (i) (2).

¹⁷ 47 C.F.R. § 0.459 (g).

Attachment (Protective Order)

cc: Leander R. Valent, Ameritech Communications, Inc.
Jonathon W. Royston, SBC Communications, Inc.
James T. Hannon, US West, Inc.
M. Robert Sutherland, BellSouth Corporation
Gordon R. Evans, Bell Atlantic
Sue Bahr, Advanstar Communications, Inc.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Ameritech Corporation Telephone Operating)	
Companies' Continuing Property Records)	
Audit)	
)	
Bell Atlantic (North) Telephone Companies')	
Continuing Property Records Audit)	
)	
Bell Atlantic (South) Telephone Companies')	CC Docket No. 99-117
Continuing Property Records Audit)	
)	
BellSouth Telecommunications' Continuing)	
Property Records Audit)	ASD File No. 99-22
)	
Pacific Bell and Nevada Bell Telephone)	
Companies' Continuing Property Records)	
Audit)	
)	
Southwestern Bell Telephone Company's)	
Continuing Property Records Audit)	
)	
US West Telephone Companies' Continuing)	
Property Records Audit)	

PROTECTIVE ORDER

This Protective Order is intended to facilitate and expedite the review of certain records not routinely available for public inspection pursuant to section 0.457(d)(1)(iii) and 0.457(e) of the Commission's rules.¹ It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated.

1. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 3 below.

¹ See 47 C.F.R. §§ 0.457 (d) (1) (iii) and 0.457 (e).

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. Confidential Information available for review pursuant to this protective order will include certain materials already existing and contained in the Commission's files, which are on file pursuant to Sections 0.457(d)(1)(iii) and 0.457(e) of the Commission's rules:

(i) Continuing Property Record (CPR) listings, for each RBOC company, of all sampled items and all undetailed investment. These listings include "undetailed investment" as defined in the Commission's publicly released audit Reports. This material will be prepared by the Commission audit staff and presented as a print out.

(ii) The Companies' evidentiary submissions. This encompasses evidence submitted by companies to show that the categorization of equipment made by audit staff is in error, including sampled items and undetailed investment items. The Commission audit staff maintains custody of these company items in notebooks.

(iii) Criteria and procedures to address rescoring issues. Procedures for rescoring were described in the Commission's released *Public Notice*.² Copies of letters from the Commission audit staff requesting information to prove physical existence of equipment will also be available.

(iv) Auditors' rescoring workpapers. These are kept in notebooks that include: Commission auditors' field notes and subsequent notes related to consideration and decisions made on rescoring issues.

(v) Chronological indication of scoring and rescoring. Consisting of a Commission staff generated spreadsheet showing sample items indicating when and if they were rescored.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating as a party in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that

² See *Public Notice*, The Accounting Safeguards Division Releases Information Concerning Audit Procedures For Considering Requests By The Regional Bell Operating Companies To Reclassify Or "Rescore" Field Audit Filings Of Their Continuing Property Records, DA 99-668, released April 7, 1999.

has sought confidential treatment of Confidential Information pursuant to this Protective Order. Submitting party may include the Commission and its staff for purposes of this Protective Order to the extent Section 0.457 (e) information is involved.

g. Proceeding. "Proceeding" means CC Docket No. 99-117 and ASD File No. 99-22 (including any subsequent administrative or judicial appeals).

2. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of Paragraph 3 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

3. Authorized Representatives shall be limited to:

- a. Counsel for the Reviewing Parties to this proceeding, including in-house counsel actively engaged in the conduct of this proceeding, and their associated attorneys, paralegals, clerical staff and other employees of counsel, to the extent reasonably necessary to render professional services in this proceeding; or
- b. Other specified persons requested by counsel for the reviewing parties to furnish technical or other expert advice or service, or otherwise engaged to prepare material, for the express purpose of preparing comments in this proceeding.

4. Inspection of Confidential Information. Inspection shall be carried out by Authorized Representatives upon reasonable notice to and arrangement with the Commission's Accounting Safeguards Division, during normal business hours, at the Commission's offices.

5. Copies of Confidential Information. Authorized Representatives shall be prohibited from making any copies of the Confidential Information. Authorized Representatives may take manual notes of the Confidential Information, but only to the extent required and solely for the purpose of preparation of comments in this proceeding. Such manual notes shall be subject to the provisions of Paragraph 10 below regarding destruction.

6. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be established by the Commission.

7. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for the preparation of comments in this proceeding unless otherwise ordered by the Commission or a court of competent jurisdiction, shall not be used for competitive business purposes, and shall

not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

8. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any comments that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

- a. Any portions of the comment that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;
- b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;
- c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked:
"Confidential Information included pursuant to Protective Order, [cite proceeding];" and
- d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal. They shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a comment containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c. of this Paragraph is not removed.

9. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice

before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

10. Termination of Proceeding. Unless otherwise ordered by the Commission or a court of competent jurisdiction, within two weeks after final resolution of this proceeding, Authorized Representatives of Reviewing Parties shall destroy or return to the Submitting Party any and all Confidential Information as well as any derivative materials made, i.e., any manual notes made as provided in Paragraph 5 above. Authorized representatives shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party and other attorney work product. Any Confidential Information contained in any copies of comments retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

11. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any Confidential Information to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of any privilege.

12. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

13. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party (other than the Commission and its staff.)

14. Authority. This Protective Order is issued pursuant to 47 U.S.C. §§ 154(i), (j), and 47 C.F.R. § 0.457(d).

DECLARATION

In the Matter of

Ameritech Corporation Telephone Operating)	
Companies' Continuing Property Records)	
Audit)	
)	
Bell Atlantic (North) Telephone Companies')	
Continuing Property Records Audit)	
)	
Bell Atlantic (South) Telephone Companies')	CC Docket No. 99-117
Continuing Property Records Audit)	
)	
BellSouth Telecommunications' Continuing)	
Property Records Audit)	ASD File No. 99-22
)	
Pacific Bell and Nevada Bell Telephone)	
Companies' Continuing Property Records)	
Audit)	
)	
Southwestern Bell Telephone Company's)	
Continuing Property Records Audit)	
)	
US West Telephone Companies' Continuing)	
Property Records Audit)	

I, _____, hereby declare under penalty of perjury that I have read the Protective Order in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding as defined in the Protective Order. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceeding in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party (other than the Commission or its staff).

(signed) _____

(printed name) _____

(representing) _____

(title) _____

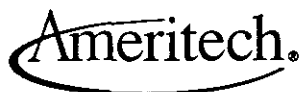
(employer) _____

(address) _____

(phone) _____

(date) _____

Exhibit 2



2
Ameritech Communications, Inc.
9525 West Bryn Mawr
Suite 600
Rosemont, IL 60018
Office 847/928-4396
Fax 847/928-8778

Leander R. Valent
Vice President & General Counsel

July 12, 1999

RECEIVED

JUL 12 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Andrew S. Fishel
Managing Director
Federal Communications Commission
445 12th St., Room 1-C144
Washington, DC 20554

RE: Ameritech Opposition to the Disclosure of Continuing
Property Record Audit Information, ASD File No. 99-22

Dear Mr. Fishel,

Ameritech¹ opposes the request of MCI WorldCom Inc. ("MCI WorldCom") for the release of certain information submitted or produced in connection with the Accounting Safeguards Division's (ASD) audit of Ameritech's continuing property record (CPR).² As detailed below, the release of the audit information would undermine the integrity and independence of the Commission's audit process, and compromise the efficiency and effectiveness of future audits. Furthermore, there is sufficient material in the public record to allow MCI WorldCom and other third parties to adequately address the issues raised in the CPR NOI, and there has been no persuasive showing to support disclosure.

MCI WorldCom requests the public release of: (i) any material submitted to ASD by Ameritech and other RBOCs subject to the audit having to do with ASD's scoring or re-scoring of the sampled items, (ii) any ASD audit workpapers on scoring, and (iii) the CPR detail for all scored items except those items scored as found.³ MCI WorldCom maintains that an item-by-item review of ASD's scoring decisions and RBOC submitted material requesting re-scoring is necessary in order to comment on whether ASD's scoring methodology was valid and reasonable in response to the Commission's CPR NOI.⁴ MCI WorldCom maintains that the information should be disclosed because it is

¹ Ameritech means: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Bell, Inc.

² See Letter dated June 22, 1999 from Ms. Mary L. Brown of MCI WorldCom to Mr. Andrew Fishel of the Federal Communications Commission, "MCI Request"

³ See MCI Request at Pages 1-2.

⁴ See *In the Matters of Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit et al*, CC Docket No. 99-117, ASD File No. 99-22, Notice of Inquiry released April 7, 1999, Issue 2, ("CPR NOI").

not commercially sensitive under FOIA exemption 4, 5 U.S.C. Section 552(b)(4) and C.F.R. Section 0.457(d) and the public interest outweighs any concerns of confidentiality.⁵ The request is without merit for several reasons and should be rejected.

First, the requested information clearly qualifies for treatment under FOIA Exemption 4⁶ and release of such information is contrary to Section 0.457(d)(iii) of the Commission's rules, which treat information gathered in connection with, "...audits, investigations and examination of records pursuant to 47 U.S.C. Section 220" as "not routinely available for public inspection."⁷ This is a long-standing practice of the Commission and should not be compromised in respect to the instant request. Deviations from this policy have only occurred rarely, and then only when aggregate summary data has been released because of an overriding public interest consideration. Such aggregate data has already been made available through the voluntary release of the CPR Audit Report and Ameritech's response to the audit's findings.⁸ The Commission should not depart from this practice, which has facilitated its ability to obtain audit information.⁹ By opening the possibility that information collected during the course of a Commission audit will eventually become public, voluntary cooperation of carriers will likely diminish and future audit-related information requests will become more contentious, time consuming, and costly to complete because carriers will take all necessary steps to avoid, mask or otherwise resist the disclosure of competitively sensitive information. In addition, the audit workpapers fall within FOIA Exemption 5 as intra-agency memoranda or workpapers¹⁰ to the extent they reflect communications between members of the Commission staff.

Second, release of the workpapers is contrary to conventional auditing practices subject to guidance provided by generally accepted auditing standards (GAAS). Ameritech has not seen the ASD's workpapers related to the CPR audit. In fact, Ameritech has never seen, nor ever requested to see, the workpapers of any audit conducted by ASD. Rather, Ameritech recognizes the importance of maintaining the integrity of the audit process and urges the Commission to continue its practice of maintaining the confidentiality of audit workpapers.

Third, MCI Worldcom has not established a legitimate need, nor has it met its burden of making a persuasive showing for disclosure of the requested information.¹¹ While MCI WorldCom may not have information with which to comment on a *specific item's* score, the audit reports contain sufficient information with which to assess the scoring methodology used by ASD¹², which is the issue on which the Commission is seeking

⁵ See MCI Request at 3-4.

⁶ 5 U.S.C. §552(b)(4).

⁷ See also GC Docket No. 96-55, Report and Order, released August 4, 1998 at §§52-57, ("Confidentiality Order"); *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (1992); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)

⁸ See *In the Matter of Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit*, ASD File No. 99-22, Order (rel. March 12, 1999).

⁹ See Confidentiality Order §52; *Scott J. Rafferty*, 5 FCC Rcd 4138 (1998) at §5.

¹⁰ See 5 U.S.C. §552(b)(5).

¹¹ See Confidentiality Order §19.

¹² See CPR NOI at 3.

comment. Moreover, the Commission should not elevate MCI Worldcom's status in this proceeding by enabling it to evaluate specific CPR information so that it can take on the role of an after-the-fact "quasi-staff auditor" in its filed comments.

Finally, the release of the requested information will cause Ameritech competitive harm in that it contains detailed cost and other information on technology investment in specific central office locations. MCI WorldCom incorrectly claims that since RBOC services are not competitive, the information cannot be considered confidential commercial information. Ameritech provides both regulated and nonregulated competitive services from any given central office, and the release of specific information would provide MCI WorldCom commercially sensitive information on the deployed technology. Contrary to MCI WorldCom's claim, the number of items at issue does not mitigate or otherwise negate the commercially sensitive nature of the information. Additionally, both the documentation submitted by Ameritech and, presumably, ASD's workpapers contain commercially sensitive and confidential information on Ameritech's accounting and business operations.

MCI Worldcom's request for disclosure, whether outright or under a protective order¹³, should be denied for the aforementioned reasons. If, however, the Commission determines to provide access to the requested information, it must do so under a protective order. Prior to any disclosure, Ameritech requests a minimum of 90 days to complete a review of all documentation and workpapers to identify and mask any confidential information unrelated to MCI WorldCom's FOIA request or the CPR audit.¹⁴

Please call me or Mr. Anthony Alessi (202/326/3822) if you need to discuss further.

Sincerely,



Leander R. Valent
Vice President and General Counsel


cc: Lisa Zaina
Kenneth Moran
Andrew Mulitz
Clifford Rand

¹³ A Commission practice on using protective orders in audit proceedings was considered, but not adopted in the Confidentiality Order, §§52-56

¹⁴ This time is necessary because of the volume of information associated with this audit, and the fact that many documents provided to the staff auditors under the expectation of confidentiality may contain proprietary information unrelated to the auditor's information request or the instant FOIA request. In addition, Ameritech should be allowed access to staff workpapers prior to providing same to MCI WorldCom under a protective order, to allow for review and masking of such out-of-scope proprietary information.

CERTIFICATE OF SERVICE

I, Debb J. Krocka, do hereby certify that on this 3rd day of August, 1999, I have caused the foregoing AMERITECH'S APPLICATION FOR REVIEW OF THE CCB'S ACTION GRANTING MCI WORLDCOM'S FOIA REQUEST to be 1) submitted via hand delivery to the Managing Director and General Counsel at the address indicated on the attached service list; and 2) served via hand delivery or first class United States Mail, postage prepaid, upon the persons listed on the attached service list.


Debb J. Krocka *dk*

-
- * Served via hand delivery
 - # Served via U.S. mail

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